

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUMI LIM,

Appellant/Plaintiff,

v.

CAROLINE BROWN,

Appellee/Defendant.

No. C 11-3894 CW

ORDER AFFIRMING
ORDER OF THE
BANKRUPTCY COURT AND
GRANTING IN PART
APPELLEE'S MOTION TO
STRIKE REPLY

IN RE:

CAROLINE BROWN,

Debtor.

Bankruptcy Case No.
09-32424 TEC

Pro se Appellant/Plaintiff Sumi Lim appeals the bankruptcy court's June 30, 2011 order denying her motion to alter or amend its October 18, 2010 order dismissing her first amended complaint (1AC) with prejudice. Appellee/Defendant Caroline Brown has filed a responsive brief and Appellant has filed a reply. Appellee has filed a motion to strike Appellant's reply. Appellant has not opposed this motion. Having considered all of the papers filed by the parties, the Court affirms the ruling of the bankruptcy court and grants, in part, Appellee's motion to strike.

BACKGROUND

On August 19, 2009, Ms. Brown filed a Chapter 7 bankruptcy

1 case. Ms. Brown's husband, Terry Brown, a real estate developer
2 and real estate agent, did not file for bankruptcy relief. Ms. Lim
3 filed, in Ms. Brown's bankruptcy case, a four-page complaint, under
4 11 U.S.C. § 523(a)(2),¹ seeking to render nondischargeable an
5 unspecified sum of money that Ms. Lim had lent to an unspecified
6 borrower in connection with an Arizona luxury condominium
7 development known as Sonterra. Ms. Brown filed a motion to
8 dismiss the complaint under Federal Rule of Civil Procedure
9 12(b)(6). After a hearing on January 29, 2010, the bankruptcy
10 court granted the motion with leave to amend. The order provided
11 that, without violating the automatic stay, Ms. Lim could file a
12 state-court action against Mr. Brown regarding the loan specified
13 in the complaint.

14 I. Allegations in First Amended Complaint

15 On March 5, 2010, Ms. Lim filed her 1AC, in which she made the
16 following allegations related to Ms. Brown. In 2006, Ms. Lim
17 learned of Mr. and Ms. Brown's condominium conversion project in
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19 ¹11 U.S.C. § 523 states in pertinent part that:

20 (a) A discharge under § 727 . . . of this title does not
21 discharge an individual debtor from any debt-

22 (2) for money, property or an extension, renewal, or
refinancing of credit, to the extent obtained by-

23 (A) false pretenses, a false representation, or actual
24 fraud, other than a statement respecting the debtor's or an
insider's financial condition.

25 To state a claim under 11 U.S.C. § 523(a)(2)(A), a plaintiff
26 must allege: (1) misrepresentation; (2) knowledge of the falsity of
the representation; (3) intent to induce reliance; (4) justifiable
27 reliance; and (5) damages. In re Kimmel, 2006 WL 6810976, *5 (9th
Cir. BAP 2006).

1 Tucson, Arizona and attended an information meeting about it. At
2 the meeting, information was presented about other large scale real
3 estate projects the Browns were developing. After the meeting, Ms.
4 Lim met personally with Mr. Brown. Mr. Brown appeared to be
5 concerned about protecting investors' investments because he had
6 full back-up teams to take over in case any of the principals were
7 incapacitated. Mr. and Ms. Brown emphasized that they guaranteed
8 the safety of their investors' money by being well insured and they
9 were willing to be generous with interest. Plaintiff was
10 especially impressed by the payment guaranty which was signed by
11 both Mr. and Ms. Brown. The guaranty was executed on December 23,
12 2005 and named as the beneficiary William Cheek and Mr. Cheek's
13 successors, endorsees, or assignees. On March 22, 2006, Ms. Lim
14 signed a contract to loan \$50,000 to Sonterra Condominiums, LP.

15 The 1AC also alleged that, at the time Ms. Lim made the loan
16 to Sonterra, Mr. and Ms. Brown were creating multiple shell
17 entities in various states and under various names to obtain money
18 and to hide money. Ms. Lim alleged that Ms. Brown knew her conduct
19 was fraudulent because she and her husband were "concealing the
20 millions of dollars they took from banks, investment groups, and
21 individual investors through these entities."

22 II. Bankruptcy Court's Rulings

23 A. October 15, 2010 Dismissal of First Amended Complaint

24 In its October 15, 2010 order dismissing the 1AC, the
25 bankruptcy court noted that Ms. Lim had corrected several
26 deficiencies in the original complaint by alleging the amount of
27 money she had loaned, the date on which it was loaned, the entity
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1 that received the loan and the loan guaranty by Mr. and Ms. Brown.
2 However, the bankruptcy court noted that Ms. Lim alleged that she
3 made the loan after attending several presentations by Mr. Brown,
4 but that she failed to allege any misrepresentations made by Ms.
5 Brown to Ms. Lim, or any of the other elements material to a
6 § 523(a)(2)(A) claim, such as when the misrepresentations were
7 made, whether Ms. Brown intended to deceive Ms. Lim through the
8 misrepresentations, whether Ms. Lim justifiably relied on Ms.
9 Brown's misrepresentations, and whether Ms. Lim's damages were
10 proximately caused by her reliance on Ms. Brown's
11 misrepresentations. The bankruptcy court also noted that Ms. Lim
12 did not allege that she was a successor, an endorsee or an assignee
13 of William Cheek, so that she was not a beneficiary of the
14 guaranty. The bankruptcy court dismissed the 1AC, without leave to
15 amend, for failure to state a claim under § 523(a)(2)(A). Ms. Lim
16 filed a motion to alter or amend this order.

17 B. June 30, 2011 Order Denying Ms. Lim's Motion to Alter
18 or Amend October 15, 2010 Order

19 In its June 30, 2010 order denying the motion to alter or
20 amend, the bankruptcy court acknowledged that, in her 1AC, Ms. Lim
21 alleged that Mr. and Ms. Brown were engaged in a fraudulent scheme
22 of issuing loan guarantees to numerous banks and individual
23 investors that they never intended to honor, that on the basis of
24 the guarantees Mr. and Ms. Brown obtained millions of dollars in
25 investments and that they absconded with the invested money by
26 transferring it to multiple businesses they owned in various
27 jurisdictions. The bankruptcy court also noted that, with her
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1 motion to alter or amend, Ms. Lim submitted a supplemental
2 complaint in which she asserted that Ms. Brown was an active
3 partner with her husband in setting up illegal entities in which
4 she served as treasurer, secretary and director.

5 However, the bankruptcy court held that Ms. Lim's motion did
6 not meet any of the requirements for reconsideration and denied the
7 motion to alter or amend its previous order.

8 Ms. Lim appeals from the June 30, 2011 order of the bankruptcy
9 court.

10 JURISDICTION AND STANDARD OF REVIEW

11 A district court has jurisdiction to hear appeals from a
12 bankruptcy court pursuant to 28 U.S.C. § 158(a). The district
13 court reviews the bankruptcy court's findings of fact according to
14 a "clearly erroneous" standard, Federal Rule of Bankruptcy
15 Procedure 8013, and reviews findings of law de novo, In re Lockard,
16 884 F.2d 1171, 1174 (9th Cir. 1989).

17 DISCUSSION

18 I. Appeal

19 Ms. Lim argues that the June 30, 2011 order was incorrect
20 because, although it was signed by the bankruptcy judge, it was
21 written by a law clerk who denied her motion with a citation to
22 just one case, Roos v. Kimmel, 2006 WL 6810976, *7-9 (9th Cir. BAP
23 2006), which has nothing to do with her claim of fraud. Ms. Lim
24 also argues that the "clerk" did not understand the significance of
25 the evidence she submitted with her 1AC that showed Ms. Brown was
26 involved in her husband's fraudulent enterprises. Ms. Lim also
27 argues that the bankruptcy court's discharge of Ms. Brown's debts
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1 was not fair to Ms. Brown's creditors because she did not provide
2 the court with tax records or financial records that showed what
3 happened to the \$200 million she and her husband borrowed from
4 investors. Finally, she argues that the bankruptcy system lacks
5 procedural justice, which makes it a haven for frauds.

6 In making these arguments, Ms. Lim does not address the law
7 that applies to a motion to alter or amend an order or judgment of
8 the court under Federal Rule of Civil Procedure 60.

9 Federal Rule of Civil Procedure 60(b) provides that, "upon
10 such terms as are just," a court may relieve a party from final
11 judgment for the following reasons:

12 (1) mistake, inadvertence, surprise, or excusable
13 neglect; (2) newly discovered evidence which by due
14 diligence could not have been discovered in time to move
15 for a new trial under Rule 59(b); (3) fraud,
16 misrepresentation, or other misconduct of an adverse
17 party; (4) the judgment is void; (5) the judgment has
18 been satisfied, released or discharged; (6) any other
19 reason justifying relief from operation of the judgment.

20 Fed. R. Civ. P. 60(b).

21 Reconsideration of a previous order of the court is an
22 "extraordinary remedy, to be used sparingly in the interests of
23 finality and conservation of judicial resources." Kona
24 Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir.
25 2000). A motion for reconsideration should not be granted unless
26 the moving party presents newly discovered evidence or shows that
27 the court committed clear error or that there was an intervening
28 change in controlling law. Id.

Although, in her motion for reconsideration, Ms. Lim submitted
additional evidence of Ms. Brown's involvement in her husband's

1 real estate dealings, this evidence was not newly discovered and
2 could have been presented in her oppositions to Ms. Brown's motions
3 to dismiss her complaints. Furthermore, Ms. Lim does not argue
4 that there was an intervening change in controlling law. Nor can
5 Ms. Lim show that the bankruptcy court committed clear error in
6 concluding that she failed to meet the requirements under §
7 523(a)(2)(A) for exempting her claim from Ms. Brown's Chapter 7
8 discharge.

9 The fact that Ms. Brown may not have filed the correct tax
10 forms with the bankruptcy court or that her creditors might suffer
11 if she was granted a discharge is not relevant to Ms. Lim's
12 § 523(a)(2)(A) motion. An analysis of Ms. Lim's § 523 claim
13 focuses solely on whether Ms. Brown intentionally made false
14 representations to Ms. Lim in order to induce Ms. Lim to rely on
15 them to make the \$50,000 loan. A review of the 1AC shows that it
16 does not allege the requisite elements of a § 523(a)(2)(A) claim
17 against Ms. Brown.

18 Ms. Lim's argument that the bankruptcy court erred because it
19 relied upon Rooz v. Kimmel, 2006 WL 6810976, *7-9 (9th Cir. BAP
20 2006) is unpersuasive. Rooz is on point, and Ms. Lim's
21 characterization of it as a community property case is incorrect.
22 Like this case, Rooz addressed a motion for an exception to
23 discharge under § 523(a)(2)(A). Id. at *1, 7. The bankruptcy
24 appellate panel (BAP) concluded that the allegations in the
25 plaintiff's complaint were "ambiguous as to substantive facts
26 constituting fraud." Id. at *7. The BAP explained that the
27 allegations more properly constituted an objection to the debtor's

1 discharge under 11 U.S.C. § 727(a),² rather than grounds for an
2 exception to the discharge of the plaintiff's claim under
3 § 523(a)(2)(A).

4 There is a strong similarity between the allegations in Rooz
5 and Ms. Lim's allegations of Ms. Brown's failure to file required
6 tax returns and failure to admit her level of involvement in her
7 husband's real estate projects. As the Rooz court noted, a § 727
8 claim is based on a general harm to all creditors; it is not
9 specific to individual creditors as is a § 523 claim. Id. at *7.
10 However, Ms. Lim did not assert a § 727 claim, and her § 523 claim
11 is deficient.

12 Furthermore, the Rooz court disapproved McClellan v. Cantrell,
13 217 F.3d 890 (7th Cir. 2000), the case on which Ms. Lim relies. In
14 McClellan, the Seventh Circuit held that § 523(a)(2)(A) actions are
15 not limited to misrepresentations and can be based on participation
16 in a fraudulent transfer. Id. at *8 (citing McClellan, 217 F.3d at
17 893. In Rooz, the BAP disagreed stating that "there is ample
18 authority in this Circuit instructing that the provisions of the
19 § 523(a) exceptions to discharge should be construed narrowly."
20 Id.

21 Ms. Lim also argues that the bankruptcy court erroneously
22 stated that she did not establish her right to repayment because

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24 ²Section 727(a)(2) denies a discharge to a debtor who, with
25 intent to hinder, delay or defraud a creditor or an officer of the
26 estate, transfers or conceals property within one year before the
27 date the petition is filed, or property of the estate after the
28 date the petition is filed. Section 727(a)(4) prohibits discharge
of a debtor who lies to the court. Section 727(a)(5) prohibits
discharge of a debtor who fails to explain satisfactorily any loss
or deficiency of assets.

1 she did not allege that she was a successor, endorsee or assignee
2 of William Cheek. Ms. Lim argues that she is entitled to repayment
3 because Ms. Brown included her on her schedule of creditors filed
4 with the bankruptcy court and because Ms. Lim filed a timely proof
5 of claim for her \$50,000 loan. Here, Ms. Lim mistakes having an
6 acknowledged claim in Ms. Brown's bankruptcy case with adequately
7 alleging that the claim should not be discharged due to Ms. Brown's
8 fraudulent conduct. The bankruptcy court did not indicate that Ms.
9 Lim did not have a valid \$50,000 claim in Ms. Brown's bankruptcy
10 case. The bankruptcy court's mention of Ms. Lim's failure to
11 allege that she was a beneficiary of the guaranty showed that any
12 false statement made by Ms. Brown in connection with the guaranty
13 could not be taken as evidence that she made a misrepresentation to
14 Ms. Lim.

15 The bankruptcy court's June 30, 2011 denial of Ms. Lim's
16 motion to alter or amend its October 18, 2010 order dismissing her
17 complaint was not in error and the order of the bankruptcy court is
18 affirmed.

19 II. Motion to Strike

20 Ms. Brown moves to strike Ms. Lim's reply on the grounds that
21 it is irrelevant to her appeal and attacks the integrity of Ms.
22 Brown's attorney, Wayne Silver. Federal Rule of Bankruptcy
23 Procedure 8011 provides authority for the district court to
24 entertain a motion to strike. A court may strike part of a brief
25 if it contains material that is not in the record below. Levald,
26 Inc. v. City of Palm Desert, 998 F.2d 680, 684, n.1 (9th Cir.
27 1993). For good cause, the Court grants the motion to strike the
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1 portion of the reply that relates to Ms. Brown's attorney.

2 CONCLUSION

3 For the foregoing reasons, the Court affirms the June 30, 2011
4 decision and order of the bankruptcy court and grants, in part, Ms.
5 Brown's motion to strike.

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7 IT IS SO ORDERED.

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9 Dated: 4/27/2012

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11 CLAUDIA WILKEN
12 United States District Judge
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